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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 696

THE UNITED STATES OF AMERICA, APPELLANT

v.

JACK MILLER AND FRANK LAYTON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the District Court, filed January 3, 1939 (R. 3), sustaining a demurrer to the indictment, is not reported.

JURISDICTION

The judgment of the District Court was entered on January 3, 1939 (R. 4). The appeal was prayed for and allowed on January 30, 1939 (R. 4, 5). The jurisdiction to review the judgment complained of, by direct appeal, is conferred by the Criminal Appeals Act of March 2, 1907, c. 2564, 34

Stat. 1246 (U. S. C., Title 18, Sec. 682), and Section 238 of the Judicial Code as amended (U. S. C., Title 28, Sec. 345). Probable jurisdiction was noted by this Court on March 13, 1939.

QUESTION PRESENTED

Whether the District Court erred in sustaining the demurrer of the appellees to the indictment on the ground that Section 11 of the National Firearms Act is invalid as contravening the Second Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the Constitution provides:

> A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Section 11 of the National Firearms Act (Act of June 26, 1934, c. 757, 48 Stat. 1236, 1239; U. S. C., Title 26, Sec. 1132j), provides:

> It shall be unlawful for any person who is required to register as provided in Section 5 hereof and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in Section 4 hereof, to ship, carry, or deliver any firearm in interstate commerce.

The National Firearms Act, as amended April 10, 1936, has been copied in its entirety in the Appendix, *infra,* pp. 22–30.

STATEMENT

The appellees were indicted on September 1, 1938, in the United States District Court for the Western District of Arkansas for violating Section 11 of the National Firearms Act (R. 1). The indictment, which was in one count, charged that on April 18, 1938, the appellees unlawfully transported in interstate commerce from the town of Claremore, Oklahoma, to the town of Siloam Springs, Arkansas, a certain firearm, to wit, a double barrel 12-gauge Stevens shotgun having a barrel less than 18 inches in length, the appellees not having registered the firearm as required by Section 5 of the National Firearms Act and not having in their possession a stamp-affixed order as required by Section 4 of the National Firearms Act and the regulations issued under authority of such Act.

The appellees filed a demurrer to the indictment which alleged, *inter alia,* that the National Firearms Act and the provisions thereof with respect to the registration of firearms and the possession of stamp-affixed orders are in violation of the Second Amendment to the Constitution (R. 2–3). In a memorandum opinion filed January 2, 1939 (R. 3), the District Judge held Section 11 of the National Firearms Act, the section under which the indict-

ment was laid, invalid, as being in contravention of the Second Amendment. The demurrer was accordingly sustained (R. 4). The other grounds assigned in the demurrer were not passed upon by the court.

On January 30, 1939, the United States filed a petition for appeal, assignment of errors, and statement of jurisdiction with the District Court (R. 4–5), and on the same day the District Court signed the order allowing an appeal (R. 5). On March 13, 1939, this Court noted probable jurisdiction.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

(1) In holding that Section 11 of the National Firearms Act is invalid as violating the Second Amendment to the Constitution.

(2) In sustaining the demurrer to the indictment.

SUMMARY OF ARGUMENT

The Second Amendment does not grant to the people the right to keep and bear arms, but merely recognizes the prior existence of that right and prohibits its infringement by Congress. It cannot be doubted that the carrying of weapons without lawful occasion or excuse was always a crime under the common law of England and of this country. In both countries the right to keep and bear arms has been generally restricted to the keeping and bearing of arms by the people collectively for their common defense and security. Indeed, the very

language of the Second Amendment discloses that this right has reference only to the keeping and bearing of arms by the people as members of the state militia or other similar military organization provided for by law. The "arms" referred to in the Second Amendment are, moreover, those which ordinarily are used for military or public defense purposes, and the cases unanimously hold that weapons peculiarly adaptable to use by criminals are not within the protection of the Amendment. The firearms referred to in the National Firearms Act, i. e., sawed-off shotguns, sawed-off rifles, and machine guns, clearly have no legitimate use in the hands of private individuals but, on the contrary, frequently constitute the arsenal of the gangster and the desperado. Section 11, upon which the indictment was based, places restrictions upon the transportation in interstate commerce of weapons of this character only, and clearly, therefore, constitutes no infringement of "the right of the people to keep and bear arms," as that term is used in the Second Amendment.

ARGUMENT

SECTION 11 OF THE NATIONAL FIREARMS ACT DOES NOT VIOLATE THE SECOND AMENDMENT

In sustaining the demurrer to the indictment the District Court in its memorandum opinion stated merely that (R. 3):

> The indictment is based upon the Act of June 26, 1934, c. 757, Section 11, 48 Statute 1239. The court is of the opinion that this

> section is invalid, in that it violates the Second Amendment to the Constitution of the United States providing, "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."

Whatever may have been the reasons which actuated the court in reaching this conclusion, we submit that "the right of the people to keep and bear arms," as that term is used in the Second Amendment, is not abridged by the Section.

Preliminarily, it may be pointed out that the National Firearms Act does not apply to all firearms but only to a limited class of firearms. The term "firearm" is defined in Section 1 of the Act (*infra*, p. 22) to refer only to "a shotgun or rifle having a barrel of less than 18 inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition."[1] But even as to this class of firearms there is not a word in the National Firearms Act which expressly prohibits the obtaining, ownership, possession or transportation thereof by anyone if compliance is had with

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[1] As amended by the Act of April 10, 1936, c. 169, 49 Stat. 1192 (*infra*, p. 22), the term *firearm* does not include a rifle which is within the foregoing provisions solely by reason of the length of its barrel if the calibre of such rifle is .22 or smaller and if its barrel is 16 inches or more in length.

the provisions relating to registration, the payment of taxes, and the possession of stamp-affixed orders (*infra*, pp. 24 *et seq.*). It may be argued that Congress, in inserting these provisions in the National Firearms Act, intended, through the exercise of its taxing power and its power to regulate interstate and foreign commerce, to discourage, except for military and law-enforcement purposes, the traffic in and utilization of the weapons to which the Act refers. But it is also indisputable that Congress was striking not at weapons intended for legitimate use but at weapons which form the arsenal of the gangster and the desperado. In the Report of the Committee on Ways and Means of the House of Representatives (H. Rep. No. 1780, 73d Cong., 2d Sess.) it was stated (pp. 1–2):

> This bill is the result of the suggestions to Congress for many years that there is a legitimate field and method of regulation of dangerous weapons by the Congress. It has been frequently pointed out that there are limitations on the States, that the Federal Government has powers in the field, and that the evil needs a remedy. The growing frequency of crimes of violence in which people are killed or injured by the use of dangerous weapons needs no comment. The gangster as a law violator must be deprived of his most dangerous weapon, the machine gun. Your committee is of the opinion that limiting the bill to the taxing

> of sawed-off guns and machine guns is sufficient at this time. It is not thought necessary to go so far as to include pistols and revolvers and sporting arms. But while there is justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction, there is no reason why anyone except a law officer should have a machine gun or sawed-off shotgun.
>
> * * * * *
>
> In general this bill follows the plan of the Harrison Anti-Narcotic Act and adopts the constitutional principle supporting that act in providing for the taxation of fire-arms and for procedure under which the tax is to be collected. It also employs the interstate and foreign commerce power to regulate interstate shipment of fire-arms and to prohibit and regulate the shipment of fire-arms into the United States.

It is apparent therefore that Section 11, the section upon which the indictment was based, places restrictions upon the transportation in interstate commerce of only those weapons which are the tools of the criminal. "The right of the people to keep and bear arms" recognized by the Second Amendment does not, we submit, guarantee to the criminal the right to maintain and utilize arms which are particularly adaptable to his purposes.

The Second Amendment does not *confer* upon the people the right to keep and bear arms; it is one

of the provisions of the Constitution which, recognizing the prior existence of a certain right, declares that it shall not be infringed by Congress. Thus the right to keep and bear arms is not a right granted by the Constitution and therefore is not dependent upon that instrument for its source. *United States* v. *Cruikshank*, 92 U. S. 542, 543; *Presser* v. *Illinois*, 116 U. S. 252, 265; *Robertson* v. *Baldwin*, 165 U. S. 275, 281.

Accordingly, in determining the nature and extent of the right referred to in the Second Amendment, we must look to the common law on the subject as it existed at the time of the adoption of the Amendment. *State* v. *Workman*, 35 W. Va. 367, 372; *State* v. *Kerner*, 181 N. C. 574, 577; cf. *Patton* v. *United States*, 281 U. S. 276, 288. While it has been said that the question whether there was a common law right to possess or carry firearms is a disputed one (*People* v. *Horton*, 264 N. Y. S. 84, 87, affirmed, 239 App. Div. 610), it cannot be doubted that at least the carrying of weapons without lawful occasion or excuse was always a crime under the common law of England [2] and was a part of our common law derived from that nation.[3]

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[2] Hawkins Pleas of the Crown (6th Ed.), Vol. 1, p. 266; Wharton on Criminal Law (11th Ed.), Vol. 3, sec. 1869; Russell on Crimes (6th Ed.), Vol. 1, pp. 588–589; Hochheimer's Criminal Law (2d Ed.), sec. 281; Blackstone Comm., Vol. 4, p. 149.

[3] Bishop's Statutory Crimes (3d Ed.), sec. 784; McClain on Criminal Law, Vol. 2, sec. 1029. See also *State* v. *Huntly*, 25 N. C. 418; *State* v. *Roten*, 86 N. C. 701.

The earliest enactment upon the subject of bearing arms (Statute of Northampton, 2 Edw. III, c. 3, enacted in 1328) seems to have gone so far as to make it a misdemeanor for anyone, except the king's ministers or servants, to go or ride anywhere armed by day or night.[4] While it would seem doubtful that this statute was construed as broadly as its language warranted, it was recognized that the statute meant at least to punish people who went armed to terrify the king's subjects and that in this respect it constituted an affirmation of the common law. In *Sir John Knight's case* (1686), 3 Mod. 117, 87 Eng. Rep. 75, the Report states (p. 118):

> The Chief Justice said, that the meaning of the statute of 2 *Edw.* 3, c. 3, was to punish people who go armed to terrify the king's

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[4] This statute (1 Statutes at Large of England, p. 422), so far as pertinent, provides:

"Item it is enacted, That no Man great nor small, of what Condition soever he be, except the King's Servants in his Presence, and his Ministers in executing of the King's Precepts, or of their Office, and such as be in their Company assisting them, and also upon a Cry made for Arms to keep the Peace, and the same in such Places where such Acts happen, be so hardy to come before the King's Justices, or other of the King's Ministers doing their Office with Force and Arms, (2) nor bring no Force in affray of the Peace, (3) nor to go nor ride armed by Night nor by Day, in Fairs, Markets, nor in the Presence of the Justices or other Ministers, nor in no Part elsewhere, upon Pain to forfeit their Armour to the King, and their Bodies to Prison at the King's Pleasure. * * *"

> subjects. It is likewise a great offence at the *common law*, as if the king were not able or willing to protect his subjects; and therefore this act is but an affirmance of that law: and it having appointed a penalty, this Court can inflict no other punishment than what is therein directed.

And in Bishop on Statutory Crimes (3d Ed.), sec. 784, it was said (p. 531):

> Whatever we may deem of this statute, the leading offense punishable by it, namely, riding or going about armed with dangerous or unusual weapons to the terror of the people, was always indictable under the common law of England, and it has become a part of the common law of our states.[5]

In further derogation of any supposed right to possess weapons conferred by the English common law, a statute was enacted in 1670 (22 Charles II, c. 25, sec. 3) which provided that no person not having lands of a yearly value of 100 pounds, other than the son and heir of an esquire or person of higher degree, should be allowed to have or use guns, bows, etc.

Thus it would seem that the early English law did not guarantee an unrestricted right to bear arms. Such recognition as existed of a right in

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[5] See also *Rex* v. *Meade*, 19 T. L. R. 540 (1903), where the court said that the firing of a revolver in a public place, with the result that the people were terrorized, was an offense not only under the Statute of Northampton, but also under the common law.

the people to keep and bear arms appears to have resulted from oppression by rulers who disarmed their political opponents and who organized large standing armies which were obnoxious and burdensome to the people. (Cooley's Constitutional Limitations (8th ed.) Vol. 1, p. 729; 28 Harvard Law Review 473.) This right, however, it is clear, gave sanction only to the arming of the people as a body to defend their rights against tyrannical and unprincipled rulers. It did not permit the keeping of arms for purposes of private defense. Thus, in *Aymette* v. *State,* 2 Humphr. (Tenn.) 154, the court, in reviewing the history and origin of the right in England to bear arms, particularly as assured by the Bill of Rights of 1688, 1 Wm. & Mary, c. 2, said (pp. 156–157.):

> By the act 22 and 23, Car. 2d, ch. 25, sec. 3, it is provided that no person who has not lands of the yearly value of £100, other than the son and heir apparent of an esquire, or other person of higher degree, &c., shall be allowed to keep a gun, &c. By this act, persons of a certain condition in life were allowed to keep arms, while a large proportion of the people were entirely disarmed. But King James the 2d, by his own arbitrary power, and contrary to law, disarmed the Protestant population and quartered his Catholic soldiers among the people. This, together with other abuses, produced the revolution by which he was compelled to ab-

dicate the throne of England. William and Mary succeeded him, and in the first year of their reign, Parliament passed an act recapitulating the abuses which existed during the former reign, and declared the existence of certain rights which they insisted upon as their undoubted privileges. Among these abuses they say, in sec. 5, that he had kept a "standing army within the kingdom in time of peace without consent of Parliament, and quartered soldiers contrary to law." Sec. 6. "By causing several good subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and employed contrary to law."

In the declaration of rights that follows, sec. 7 declares, that "the subjects which are Protestants may have arms for their defence, suitable to their condition and as allowed by law." This declaration, although it asserts the right of the Protestants to have arms, does not extend the privilege beyond the terms provided in the act of Charles 2d, before referred to. "They may have arms," says the Parliament, "suitable to their condition, and as allowed by law." The *law*, we have seen, only allowed persons of a certain *rank* to have arms, and consequently this declaration of right had reference to such only. It was in reference to these facts, and to this state of the English law, that the second section of the amendment to the Constitution of the United States was incorporated into that instrument. It declares that "a

well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."

* * * * *

The evil that was produced by disarming the people in the time of James the second was that the King, by means of a standing army, quartered among the people, was able to overawe them, and compel them to submit to the most arbitrary, cruel, and illegal measures. Whereas, if the people had retained their arms, they would have been able, by a just and proper resistance to those oppressive measures, either to have caused the King to respect their rights, or surrender (as he was eventually compelled to do) the government into other hands. No private defence was contemplated or would have availed anything. If the subjects had been armed, they could have resisted the payment of excessive fines, or the infliction of illegal and cruel punishments. When, therefore, Parliament says, that "subjects which are Protestants may have arms for their defence, suitable to their condition as allowed by law," it does not mean for *private defence,* but being armed, they may as a body, rise up to defend their just rights, and compel their rulers to respect the laws. This declaration of right is made in reference to the fact before complained of, that the people had been disarmed, and soldiers had been quartered

among them contrary to law. The complaint was against the *government*. The grievances to which they were thus forced to submit were for the most part of a public character, and could have been redressed only by the people rising up for their *common defence* to vindicate their rights.

In this country, as in England, it has been almost universally recognized that the right to keep and bear arms, guaranteed in both the Federal and State Constitutions, had its origin in the attachment of the people to the utilization as a protective force of a well-regulated militia as contrasted with a standing army which might possibly be used to oppress them. (*People* v. *Brown*, 253 Mich. 537, 539; Cooley's Constitutional Limitations (8th ed.), vol. 1, p. 729; Story on the Constitution (2d ed.), vol. 2, secs. 1897–1898; 28 Harvard Law Review 473; see also the Third Amendment to the Constitution.) Indeed, the very declaration in the Second Amendment that "a well-regulated militia, being necessary to the security of a free State." indicates that the right secured by that Amendment to the people to keep and bear arms is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state. In *Salina* v. *Blaksley*, 72 Kan. 230, the court, in referring to the provision of the State Constitution declaring that the people had the right to bear

arms for their defense and security, said (pp. 232–233):

> That the provision in question applies only to the right to bear arms as a member of the state militia, or some other military organization provided for by law, is also apparent from the second amendment to the federal constitution, which says: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Here also the right of the people to keep and bear arms for their security is preserved, and the manner of bearing them for such purpose is clearly indicated to be as a member of a well-regulated militia, or some other military organization provided for by law.

And in *State* v. *Buzzard,* 4 Ark. 18, the court, in referring to the Second Amendment, said (pp. 24–25):

> If these general powers of the government are restricted in regard to the right to keep and bear arms, the limitation, to whatever extent it may exist, will be better understood, and more clearly seen, when the object for which the right is supposed to have been retained, is stated. That object could not have been to protect or redress by individual force, such rights as are merely private and individual, as has been already, it is believed, sufficiently shown; consequently, the object must have been to provide an additional security for the public liberty and the free

institutions of the State, as no other important object is perceived, which the reservation of such right could have been designed to effect. Besides which, the language used appears to indicate, distinctly, that this, and this alone, was the object for which the article under consideration was adopted. And it is equally apparent, that a well regulated militia was considered by the people as the best security a free state could have, or at least, the best within their power to provide. But it was also well understood, that the militia, without arms, however well disposed, might be unable to resist, successfully, the efforts of those who should conspire to overthrow the established institutions of the country, or subjugate their common liberties; and therefore, to guard most effectually against such consequences, and enable the militia to discharge this most important trust, so reposed in them, and for this purpose only, it is conceived the right to keep and bear arms was retained, and the power which, without such reservation, would have been vested in the government, to prohibit, by law, their keeping and bearing arms for any purpose whatever, was so far limited or withdrawn: which conclusion derives additional support from the well known fact, that the practice of maintaining a large standing army in times of peace, had been denounced and repudiated by the people of the United States, as an institution dangerous to civil liberty and a free State, which produced, at once, the necessity of providing some ade-

> quate means for the security and defence of the State, more congenial to civil liberty and republican government. And it is confidently believed that the people designed and expected to accomplish this object, by the adoption of the article under consideration, which would forever invest them with a legal right to keep and bear arms for that purpose; but it surely was not designed to operate as an immunity to those, who should so keep or bear their arms as to injure or endanger the private rights of others, or in any manner prejudice the common interests of society.

While some courts have said that the right to bear arms includes the right of the individual to have them for the protection of his person and property as well as the right of the people to bear them collectively (*People* v. *Brown,* 253 Mich. 537; *State* v. *Duke,* 42 Tex. 455), the cases are unanimous in holding that the term "arms" as used in constitutional provisions refers only to those weapons which are ordinarily used for military or public defense purposes and does not relate to those weapons which are commonly used by criminals. Thus in *Aymette* v. *State, supra,* it was said (p. 158):

> As the object for which the right to keep and bear arms is secured, is of general and public nature, to be exercised by the people in a body, for their *common defence,* so the *arms,* the right to keep which is secured, are such as are usually employed in civilized warfare, and that constitute the ordi-

> nary military equipment. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority. They need not, for such a purpose, the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin. These weapons would be useless in war. They could not be employed advantageously in the common defence of the citizens. The right to keep and bear them, is not, therefore, secured by the constitution.

In *State* v. *Workman*, 35 W. Va. 367, 373, *supra*, it was likewise said:

> * * * in regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets—arms to be used in defending the State and civil liberty—and not to pistols, bowie-knives, brass knuckles, billies, and such other weapons as are usually employed in brawls, street-fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the State. Bish. Crim. St. § 792.

See also *State* v. *Blaksley*, 72 Kan. 230; *People* v. *Persce*, 204 N. Y. 397; *People* v. *Warden*, 139 N. Y. S. 277; *People* v. *Ferguson*, 129 Cal. App. 300; *Ex parte Thomas*, 1 Okla. Cr. R. 210; *Andrews* v. *State*, 3 Heisk. (Tenn.) 165; *Fife* v. *State*, 31 Ark.

455; *State* v. *Duke*, 42 Tex. 455; *People* v. *Brown*, 253 Mich. 537; *State* v. *Hogan*, 63 Ohio St. 202; *Pierce* v. *State*, 42 Okla. Cr. R. 272; *Mathews* v. *State*, 33 Okla. Cr. R. 347; *English* v. *State*, 35 Tex. 473; *State* v. *Kerner*, 181 N. C. 574; *Glenn* v. *State*, 10 Ga. App. 128; *Hill* v. *State*, 53 Ga. 472.[6]

In recognition of this principle, this Court, in *Robertson* v. *Baldwin*, 165 U. S. 275, 281–282, stated that the right of the people to keep and bear arms is not infringed by laws prohibiting the carrying of concealed weapons.

That the foregoing cases conclusively establish that the Second Amendment has relation only to the right of the people to keep and bear arms for lawful purposes and does not conceivably relate to weapons of the type referred to in the National Firearms Act cannot be doubted. Sawed-off shotguns, sawed-off rifles and machine guns are clearly weapons which can have no legitimate use in the hands of private individuals. On the contrary they frequently constitute the arsenal of the "public enemy" and the "gangster" and are not weapons of the character which, as was said in *People* v. *Brown*, 253 Mich. 537, 542, are recognized by the common opinion of good citizens as proper for defence.

In the only other case in which the provisions of the National Firearms Act have been assailed as

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[6] It has even been said in *Walter* v. *State*, 3 Ohio N. P. N. S. 13, that it is doubtful whether a shotgun is within the meaning of the term "arms" as used in the Constitution of Ohio.

being in violation of the Second Amendment (*United States* v. *Adams*, 11 F. Supp. 216 (S. D. Fla.)), the contention was summarily rejected as follows (pp. 218–219):

> The second amendment to the Constitution, providing, "the right of the people to keep and bear arms, shall not be infringed," has no application to this act. The Constitution does not grant the privilege to racketeers and desperadoes to carry weapons of the character dealt with in the act. It refers to the militia, a protective force of government; to the collective body and not individual rights. * * *

CONCLUSION

For the reasons stated, we respectfully submit that Section 11 of the National Firearms Act does not infringe "the right of the people to keep and bear arms" secured by the Second Amendment, and therefore that the judgment of the District Court should be reversed and the cause remanded for further proceedings.

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MARCH 1939.

APPENDIX

National Firearms Act of June 26, 1934, c. 757, 48 Stat. 1236, as amended by the Act of April 10, 1936, c. 169, 49 Stat. 1192 (U. S. C., Title 26, Secs. 1132–1132q; U. S. C. (Supp. IV), Title 26, Sec. 1132)

AN ACT To provide for the taxation of manufacturers, importers, and dealers in certain firearms and machine guns, to tax the sale or other disposal of such weapons, and to restrict importation and regulate interstate transportation thereof.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purposes of this Act—

(a) The term "firearm" means a shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition.[1]

(b) The term "machine gun" means any weapon which shoots, or is designed to shoot, automatically or semiautomatically, more than one shot,

[1] The Act of April 10, 1936, c. 169, 49 Stat. 1192 (U. S. C., Supp. IV, Title 26, sec. 1132), amended this section by providing:

"That subsection (a) of section 1 of the National Firearms Act relating to the definition of 'firearms' is amended by inserting after 'definition' a comma and the following: 'but does not include any rifle which is within the foregoing provisions solely by reason of the length of its barrel if the caliber of such rifle is .22 or smaller and if its barrel is sixteen inches or more in length.'"

without manual reloading, by a single function of the trigger.

(c) The term "person" includes a partnership, company, association, or corporation, as well as a natural person.

(d) The term "continental United States" means the States of the United States and the District of Columbia.

(e) The term "importer" means any person who imports or brings firearms into the continental United States for sale.

(f) The term "manufacturer" means any person who is engaged within the continental United States in the manufacture of firearms, or who otherwise produces therein any firearm for sale or disposition.

(g) The term "dealer" means any person not a manufacturer or importer engaged within the continental United States in the business of selling firearms. The term "dealer" shall include wholesalers, pawnbrokers, and dealers in used firearms.

(h) The term "interstate commerce" means transportation from any State or Territory or District, or any insular possession of the United States (including the Philippine Islands), to any other State or to the District of Columbia.

(i) The term "Commissioner" means the Commissioner of Internal Revenue.

(j) The term "Secretary" means the Secretary of the Treasury.

(k) The term "to transfer" or "transferred" shall include to sell, assign, pledge, lease, loan, give away, or otherwise dispose of.

SEC. 2. (a) Within fifteen days after the effective date of this Act, or upon first engaging in business,

and thereafter on or before the 1st day of July of each year, every importer, manufacturer, and dealer in firearms shall register with the collector of internal revenue for each district in which such business is to be carried on his name or style, principal place of business, and places of business in such district, and pay a special tax at the following rates: Importers or manufacturers, $500 a year; dealers, other than pawnbrokers, $200 a year; pawnbrokers, $300 a year. Where the tax is payable on the 1st day of July in any year it shall be computed for one year; where the tax is payable on any other day it shall be computed proportionately from the 1st day of the month in which the liability to the tax accrued to the 1st day of July following.

(b) It shall be unlawful for any person required to register under the provisions of this section to import, manufacture, or deal in firearms without having registered and paid the tax imposed by this section.

SEC. 3. (a) There shall be levied, collected, and paid upon firearms transferred in the continental United States a tax at the rate of $200 for each firearm, such tax to be paid by the transferor, and to be represented by appropriate stamps to be provided by the Commissioner, with the approval of the Secretary; and the stamps herein provided shall be affixed to the order for such firearm, hereinafter provided for. The tax imposed by this section shall be in addition to any import duty imposed on such firearm.

(b) All provisions of law (including those relating to special taxes, to the assessment, collection, remission, and refund of internal revenue taxes,

to the engraving, issuance, sale, accountability, cancelation, and distribution of tax-paid stamps provided for in the internal-revenue laws, and to penalties) applicable with respect to the taxes imposed by section 1 of the Act of December 17, 1914, as amended (U. S. C., Supp. VII, title 26, secs. 1040 and 1383), and all other provisions of the internal-revenue laws shall, insofar as not inconsistent with the provisions of this Act, be applicable with respect to the taxes imposed by this Act.

(c) Under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe, and upon proof of the exportation of any firearm to any foreign country (whether exported as part of another article or not) with respect to which the transfer tax under this section has been paid by the manufacturer, the Commissioner shall refund to the manufacturer the amount of the tax so paid, or, if the manufacturer waives all claim for the amount to be refunded, the refund shall be made to the exporter.

SEC. 4. (a) It shall be unlawful for any person to transfer a firearm except in pursuance of a written order from the person seeking to obtain such article, on an application form issued in blank in duplicate for that purpose by the Commissioner. Such order shall identify the applicant by such means of identification as may be prescribed by regulations under this Act: *Provided*, That, if the applicant is an individual, such identification shall include fingerprints and a photograph thereof.

(b) The Commissioner, with the approval of the Secretary, shall cause suitable forms to be pre-

pared for the purposes above mentioned, and shall cause the same to be distributed to collectors of internal revenue.

(c) Every person so transferring a firearm shall set forth in each copy of such order the manufacturer's number or other mark identifying such firearm, and shall forward a copy of such order to the Commissioner. The original thereof with stamps affixed, shall be returned to the applicant.

(d) No person shall transfer a firearm which has previously been transferred on or after the effective date of this Act, unless such person, in addition to complying with subsection (c), transfers therewith the stamp-affixed order provided for in this section for each such prior transfer, in compliance with such regulations as may be prescribed under this Act for proof of payment of all taxes on such firearms.

(e) If the transfer of a firearm is exempted from the provisions of this Act as provided in section 13 hereof, the person transferring such firearm shall notify the Commissioner of the name and address of the applicant, the number or other mark identifying such firearm, and the date of its transfer, and shall file with the Commissioner such documents in proof thereof as the Commissioner may by regulations prescribe.

(f) Importers, manufacturers, and dealers who have registered and paid the tax as provided for in section 2 (a) of this Act shall not be required to conform to the provisions of this section with respect to transactions in firearms with dealers or manufacturers if such dealers or manufacturers have registered and have paid such tax, but shall keep such records and make such reports regarding

such transactions as may be prescribed by regulations under this Act.

SEC. 5. (a) Within sixty days after the effective date of this Act every person possessing a firearm shall register, with the collector of the district in which he resides, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof: *Provided,* That no person shall be required to register under this section with respect to any firearm acquired after the effective date of, and in conformity with the provisions of, this Act.

(b) Whenever on trial for a violation of section 6 hereof the defendant is shown to have or to have had possession of such firearm at any time after such period of sixty days without having registered as required by this section, such possession shall create a presumption that such firearm came into the possession of the defendant subsequent to the effective date of this Act, but this presumption shall not be conclusive.

SEC. 6. It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of section 3 or 4 of this Act.

SEC. 7. (a) Any firearm which has at any time been transferred in violation of the provisions of this Act shall be subject to seizure and forfeiture, and (except as provided in subsection (b)) all the provisions of internal-revenue laws relating to searches, seizures, and forfeiture of unstamped articles are extended to and made to apply to the

articles taxed under this Act, and the persons to whom this Act applies.

(b) In the case of the forfeiture of any firearm by reason of a violation of this Act: No notice of public sale shall be required; no such firearm shall be sold at public sale; if such firearm is in the possession of any officer of the United States except the Secretary, such officer shall deliver the firearm to the Secretary; and the Secretary may order such firearm destroyed or may sell such firearm to any State, Territory, or possession (including the Philippine Islands), or political subdivision thereof, or the District of Columbia, or retain it for the use of the Treasury Department or transfer it without charge to any Executive department or independent establishment of the Government for use by it.

SEC. 8. (a) Each manufacturer and importer of a firearm shall identify it with a number or other identification mark approved by the Commissioner, such number or mark to be stamped or otherwise placed thereon in a manner approved by the Commissioner.

(b) It shall be unlawful for anyone to obliterate, remove, change, or alter such number or other identification mark. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any firearm upon which such number or mark shall have been obliterated, removed, changed, or altered, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.

SEC. 9. Importers, manufacturers, and dealers shall keep such books and records and render such returns in relation to the transactions in firearms

specified in this Act as the Commissioner, with the approval of the Secretary, may by regulations require.

SEC. 10. (a) No firearm shall be imported or brought into the United States or any territory under its control or jurisdiction (including the Philippine Islands), except that, under regulations prescribed by the Secretary, any firearm may be so imported or brought in when (1) the purpose thereof is shown to be lawful and (2) such firearm is unique or of a type which cannot be obtained within the United States or such territory.

(b) It shall be unlawful (1) fraudulently or knowingly to import or bring any firearm into the United States or any territory under its control or jurisdiction (including the Philippine Islands), in violation of the provisions of this Act; or (2) knowingly to assist in so doing; or (3) to receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of any such firearm after being imported or brought in, knowing the same to have been imported or brought in contrary to law. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains such possession to the satisfaction of the jury.

SEC. 11. It shall be unlawful for any person who is required to register as provided in section 5 hereof and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in section 4 hereof, to ship, carry, or deliver any firearm in interstate commerce.

SEC. 12. The Commissioner, with the approval of the Secretary, shall prescribe such rules and regulations as may be necessary for carrying the provisions of this Act into effect.

SEC. 13. This Act shall not apply to the transfer of firearms (1) to the United States Government, any State, Territory, or possession of the United States, or to any political subdivision thereof, or to the District of Columbia; (2) to any peace officer or any Federal officer designated by regulations of the Commissioner; (3) to the transfer of any firearm which is unserviceable and which is transferred as a curiosity or ornament.

SEC. 14. Any person who violates or fails to comply with any of the requirements of this Act shall, upon conviction, be fined not more than $2,000 or be imprisoned for not more than five years, or both, in the discretion of the court.

SEC. 15. The taxes imposed by paragraph (a) of section 600 of the Revenue Act of 1926 (U. S. C., Supp. VII, title 26, sec. 1120) and by section 610 of the Revenue Act of 1932 (47 Stat. 169, 264), shall not apply to any firearm on which the tax provided by section 3 of this Act has been paid.

SEC. 16. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

SEC. 17. This Act shall take effect on the thirtieth day after the date of its enactment.

SEC. 18. This Act may be cited as the "National Firearms Act."

Approved, June 26, 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934

SUPREME COURT OF THE UNITED STATES.

No. 696.—October Term, 1938.

The United States of America, Appellant, vs. Jack Miller and Frank Layton.	Appeal from the District Court of the United States for the Western District of Arkansas.

[May 15, 1939.]

Mr. Justice McReynolds delivered the opinion of the Court.

An indictment in the District Court Western District Arkansas, charged that Jack Miller and Frank Layton

"did unlawfully, knowingly, wilfully, and feloniously transport in interstate commerce from the town of Claremore in the State of Oklahoma to the town of Siloam Springs in the State of Arkansas a certain firearm, to-wit, a double barrel 12-gauge Stevens shotgun having a barrel less than 18 inches in length, bearing identification number 76230, said defendants, at the time of so transporting said firearm in interstate commerce as aforesaid, not having registered said firearm as required by Section 1132d of Title 26, United States Code (Act of June 26, 1934, c. ~~735~~ 757, Sec. 5, 48 Stat. 1237), and not having in their possession a stamp-affixed written order for said firearm as provided by Section 1132c, Title 26, United States Code (June 26, 1934, c. ~~735~~ 757, Sec. 4, 48 Stat. 1237) and the regulations issued under authority of the said Act of Congress known as the "National Firearms Act" approved June 26, 1934, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."[1]

[1] Act of June 26, 1934, c. 757, 48 Stat. 1236-1240, 26 U. S. C. A. sec. 1132. That for the purposes of this Act—

(a) The term "firearm" means a shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition, [The Act of April 10, 1936, c. 169, 49 Stat. 1192 added the words] but does not include any rifle which is within the foregoing provisions solely by reason of the length of its barrel if the caliber of such rifle is .22 or smaller and if its barrel is sixteen inches or more in length.

Sec. 3. (a) There shall be levied, collected, and paid upon firearms transferred in the continental United States a tax at the rate of $200 for each firearm, such tax to be paid by the transferor, and to be represented by appropriate stamps to be provided by the Commissioner, with the approval of

A duly interposed demurrer alleged: The National Firearms Act is not a revenue measure but an attempt to usurp police power reserved to the States, and is therefore unconstitutional. Also, it offends the inhibition of the Second Amendment to the Constitution—"A well regulated Militia, being necessary to the security of a free State, the right of people to keep and bear Arms, shall not be infringed."

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the Secretary; and the stamps herein provided shall be affixed to the order for such firearm, hereinafter provided for. The tax imposed by this section shall be in addition to any import duty imposed on such firearm.

Sec. 4. (a) It shall be unlawful for any person to transfer a firearm except in pursuance of a written order from the person seeking to obtain such article, on an application form issued in blank in duplicate for that purpose by the Commissioner. Such order shall identify the applicant by such means of identification as may be prescribed by regulations under this Act: *Provided*, That, if the applicant is an individual, such identification shall include fingerprints and a photograph thereof.

(c) Every person so transferring a firearm shall set forth in each copy of such order the manufacturer's number or other mark identifying such firearm, and shall forward a copy of such order to the Commissioner. The original thereof with stamps affixed, shall be returned to the applicant.

(d) No person shall transfer a firearm which has previously been transferred on or after the effective date of this Act, unless such person, in addition to complying with subsection (c), transfers therewith the stamp-affixed order provided for in this section for each such prior transfer, in compliance with such regulations as may be prescribed under this Act for proof of payment of all taxes on such firearms.

Sec. 5. (a) Within sixty days after the effective date of this Act every person possessing a firearm shall register, with the collector of the district in which he resides, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof: *Provided*, That no person shall be required to register under this section with respect to any firearm acquired after the effective date of, and in conformity with the provisions of, this Act.

Sec. 6. It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of section 3 or 4 of this Act.

Sec. 11. It shall be unlawful for any person who is required to register as provided in section 5 hereof and who shall not have so registered, or any other person who has not in his possession a stamp-affixed order as provided in section 4 hereof, to ship, carry, or deliver any firearm in interstate commerce.

Sec. 12. The Commissioner, with the approval of the Secretary, shall prescribe such rules and regulations as may be necessary for carrying the provisions of this Act into effect.

Sec. 14. Any person who violates or fails to comply with any of the requirements of this Act shall, upon conviction, be fined not more than $2,000 or be imprisoned for not more than five years, or both, in the discretion of the court.

Sec. 16. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

Sec. 18. This Act may be cited as the "National Firearms Act."

The District Court held that section eleven of the Act violates the Second Amendment. It accordingly sustained the demurrer and quashed the indictment.

The cause is here by direct appeal.

Considering *Sonzinsky* v. *United States* (1937), 300 U. S. 506, 513, and what was ruled in sundry causes arising under the Harrison Narcotic Act[2]—*United States* v. *Jin Fuey Moy* (1916), 241 U. S. 394; *United States* v. *Doremus* (1919), 249 U. S. 86, 94; *Linder* v. *United States* (1925), 268 U. S. 5; *Alston* v. *United States* (1927), 274 U. S. 289; *Nigro* v. *United States* (1928), 276 U. S. 332—the objection that the Act usurps police power reserved to the States is plainly untenable.

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette* v. *The State*, 2 Humphreys (Tenn.) 154, 158.

The Constitution as originally adopted granted to the Congress power—"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.

[2] Act December 17, 1914, c. 1, 38 Stat. 785; February 24, 1919, c. 18, 40 Stat. 1057.

The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.

Blackstone's Commentaries, Vol. 2, Ch. 13, p. 409 points out "that king Alfred first settled a national militia in this kingdom" and traces the subsequent development and use of such forces.

Adam Smith's Wealth of Nations, Book V. Ch. 1, contains an extended account of the Militia. It is there said: "Men of republican principles have been jealous of a standing army as dangerous to liberty." "In a militia, the character of the labourer, artificer, or tradesman, predominates over that of the soldier: in a standing army, that of the soldier predominates over every other character; and in this distinction seems to consist the essential difference between those two different species of military force."

"The American Colonies In The 17th Century", Osgood, Vol. 1, ch. XIII, affirms in reference to the early system of defense in New England—

"In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defence." "The possession of arms also implied the possession of ammunition, and the authorities paid quite as much attention to the latter as to the former." "A year later [1632] it was ordered that any single man who had not furnished himself with arms might be put out to service, and this became a permanent part of the legislation of the colony [Massachusetts]."

Also "Clauses intended to insure the possession of arms and ammunition by all who were subject to military service appear in all the important enactments concerning military affairs. Fines were the penalty for delinquency, whether of towns or individuals. According to the usage of the times, the infantry of Massachusetts consisted of pikemen and musketeers. The law, as enacted in 1649 and thereafter, provided that each of the former should be armed with a pike, corselet, head-piece, sword, and knapsack. The musketeer should carry a 'good fixed musket,' not under bastard mus-

ket bore, not less than three feet, nine inches, nor more than four feet three inches in length, a priming wire, scourer, and mould, a sword, rest, bandoleers, one pound of powder, twenty bullets, and two fathoms of match. The law also required that two-thirds of each company should be musketeers."

The General Court of Massachusetts, January Session 1784, provided for the organization and government of the Militia. It directed that the Train Band should "contain all able bodied men, from sixteen to forty years of age, and the Alarm List, all other men under sixty years of age, ..." Also, "That every non-commissioned officer and private soldier of the said militia not under the controul of parents, masters or guardians, and being of sufficient ability therefor in the judgment of the Selectmen of the town in which he shall dwell, shall equip himself, and be constantly provided with a good fire arm, &c."

By an Act passed April 4, 1786 the New York Legislature directed: "That every able-bodied Male Person, being a Citizen of this State, or of any of the United States, and residing in this State, (except such Persons as are herein after excepted) and who are of the Age of Sixteen, and under the Age of Forty-five Years, shall, by the Captain or commanding Officer of the Beat in which such Citizens shall reside, within four Months after the passing of this Act, be enrolled in the Company of such Beat. . . . That every Citizen so enrolled and notified, shall, within three Months thereafter, provide himself, at his own Expense, with a good Musket or Firelock, a sufficient Bayonet and Belt, a Pouch with a Box therein to contain not less than Twenty-four Cartridges suited to the Bore of his Musket or Firelock, each Cartridge containing a proper Quantity of Powder and Ball, two spare Flints, a Blanket and Knapsack; . . . ."

The General Assembly of Virginia. October, 1785, (12 Hening's Statutes) declared, "The defense and safety of the commonwealth depend upon having its citizens properly armed and taught the knowledge of military duty."

It further provided for organization and control of the Militia and directed that "All free male persons between the ages of eighteen and fifty years," with certain exceptions, "shall be inrolled or formed into companies." "There shall be a private muster of every company once in two months."

Also that "Every officer and soldier shall appear at his respective muster-field on the day appointed, by eleven o'clock in the forenoon, armed, equipped, and accoutred, as follows:

every non-commissioned officer and private with a good, clean musket carrying an ounce ball, and three feet eight inches long in the barrel, with a good bayonet and iron ramrod well fitted thereto, a cartridge box properly made, to contain and secure twenty cartridges fitted to his musket, a good knapsack and canteen, and moreover, each non-commissioned officer and private shall have at every muster one pound of good powder, and four pounds of lead including twenty blind cartridges; and each serjeant shall have a pair of moulds fit to cast balls for their respective companies, to be purchased by the commanding officer out of the monies arising on delinquencies. *Provided*, That the militia of the counties westward of the Blue Ridge, and the counties below adjoining thereto, shall not be obliged to be armed with muskets, but may have good rifles with proper accoutrements, in lieu thereof. And every of the said officers, non-commissioned officers, and privates, shall constantly keep the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for by his commanding officer. If any private shall make it appear to the satisfaction of the court hereafter to be appointed for trying delinquencies under this act that he is so poor that he cannot purchase the arms herein required, such court shall cause them to be purchased out of the money arising from delinquents."

Most if not all of the States have adopted provisions touching the right to keep and bear arms. Differences in the language employed in these have naturally led to somewhat variant conclusions concerning the scope of the right guaranteed. But none of them seem to afford any material support for the challenged ruling of the court below.

In the margin some of the more important opinions and comments by writers are cited.[3]

We are unable to accept the conclusion of the court below and the challenged judgment must be reversed. The cause will be remanded for further proceedings.

Mr. Justice DOUGLAS took no part in the consideration or decision of this cause.

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[3] Concerning The Militia—Presser *v.* Illinois, 116 U. S. 252; Robertson *v.* Baldwin, 165 U. S. 275; Fife *v.* State, 31 Ark. 455; Jeffers *v.* Fair, 33 Georgia 347; Salina *v.* Blaksley, 72 Kan. 230; People *v.* Brown, 253 Mich. 537; Aymette *v.* State, 2 Humphr. (Tenn.) 154; State *v.* Duke, 42 Texas 455; State *v.* Workman, 35 W. Va. 367; Cooley's Constitutional Limitations, Vol. 1, p. 729; Story on The Constitution, 5th Ed., Vol. 2, p. 646; Encyclopaedia of the Social Sciences, Vol. X, p. 471, 474.